IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 24TH AUGUST 2007 / 2ND BHADRA 1929

Crl.MC.No. 2123 of 2004(A)

AGAINST THE ORDER IN LP.142/03 IN
ST.396/2000 of CHIEF JUDICIAL MAGISTRATE COURT, THRISSUR

.....

PETITIONER:/ACCUSED.

RAJAN ANCHARAKKANDY, S/O.GOPALAN,
M/S.ANCHARAKKANDY CONSTRUCTION, R/A.
ANCHARAKKANDY HOUSE, P.O.VALAYAM, NEAR VALAYAM
NURSING HOME, VADAKARA.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS:/STATE AND COMPLAINANT.

---

1. THE NATIONAL SMALL INDUSTRIES
CORPORATION LTD., VISITORS BUILDING, M.R.ROAD,
THRISSUR -4, REP. BY DEVELOPMENT OFFICER,
(LAW) AND POWER OF ATTORNEY HOLDER D.PAUL,
THE NATIONAL SMALL INDUSTRIES CORPORATION LTD.,
VISITORS BUILDING M.G.ROAD, THRISSUR-4.

2. STATE OF KERLA, REP. BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.K.P.DANDAPANI
BY PUBLIC PROSECUTOR SHRI GIKKU JACOB.

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 24/08/2007, ALONG WITH CRMC . 2241 OF 2004 AND CONNECTED MATTERS, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T. SANKARAN, J.

.....

CRL.M.C.Nos. 2123, 2127, 2241, 2244, 2246, 2250, 2252, 2256, 2295, 2296, 2298, 2302 and 2311 of 2004

.....

Dated this the 24th August, 2007

O R D E R

The question of law involved in these Criminal Miscellaneous cases is, whether in a complaint under section 138 of the Negotiable Instruments Act, filed by a Government Company as defined under section 617 of the Companies Act represented by its Development Officer (Law), it is necessary for the Magistrate to examine the complainant under section 200 of the Code of Criminal Procedure or whether clause (a) of the first proviso to Section 200 would apply to the case.

2. Five Criminal Miscellaneous cases are filed by the accused Surendran seeking to quash the proceedings in five cases pending before the Court of the Judicial Magistrate of the First Class-I, Ernakulam. Other eight Criminal Miscellaneous cases are filed by Rajan, accused in those cases, to quash the proceedings therein, pending before the Courts of Chief Judicial Magistrate, Ernakulam, Chief Judicial Magistrate, Thrissur

and Courts of Judicial Magistrate of the First Class at Thrissur, Kochi and Ernakulam.

3. The complaint was filed by the National Small Industries Corporation Limited represented by its Development Officer (Law). It is stated in the complaint that the complainant is a Government Company as defined under section 617 of the Companies Act. The Company is represented by the Development Officer (Law) who is also the Power of Attorney Holder authorised to file the complaint. It is further stated in the complaint thus:

> *"The Power of Attorney Holder is a public servant within the ambit of Section 21 of the Indian Penal Code. Since the complainant is represented by a public servant and he is discharging his official duties, he is exempted from giving sworn statement u/s. 200 of the Criminal Procedure Code for taking cognizance of the offence."*

4. The contentions raised by Shri T.G.Rajendran and Shri K.S. Madhusoodanan, learned counsel appearing for the petitioners in these Criminal Miscellaneous cases is that the learned Magistrate was not justified in taking cognizance of the case and in issuing process to the accused without taking the sworn statement of the complainant and

without examining upon oath the complainant under section 200 of the Code of Criminal Procedure. It is also submitted that clause (a) to the first proviso to Section 200 is not attracted in these cases and therefore, the complainant cannot get immunity from examination upon oath as provided under section 200. Sri.K.P.Dandapani, Senior Advocate submits that clause (a) to the first proviso of Section 200 of the Code of Criminal Procedure would apply in the case.

5. For the sake of convenience, Section 200 is extracted below:

> *"200. Examination of complainant:- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*
>
> *Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-*
>
> *(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or*
>
> *(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192.*

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them. "

6. Section 200 of the Code of Criminal Procedure,1898 was also almost in similar terms. Relevant portion of Section 200 of the Code of Criminal Procedure, 1898 is as follows:

"200. Examination of complainant:- A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate:

Provided as follows:

(a) When the complaint is made in writing , nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192;

(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties"

The change brought out in 1973 Code was that the words '***at once***' in Section 200 of the Code of Criminal Procedure 1898 were deleted in the 1973 Code. The proviso under 1898 Code was re-drafted , thereby clause (aa) of the proviso to Section 200 in the 1898 Code corresponds to the present clause (a) of the first proviso to section 200 of the 1973 Code. Of course, except the slight modification in the words, clause (aa) of the proviso to Section 200 of 1898 Code is substantially the same as clause (a) of the first proviso to Section 200 of 1973 Code. Section 21 of the Indian Penal Code defines ' Public servant'. The 12th clause is relevant for the purpose of this case, which reads as under:

> *"21. "Public Servant":- The words "public servant ' denote a person falling under any of the descriptions hereinafter following, namely:-*
>
> *xx xx xx xx xx*
>
> *Twelfth:- Every person-*
>
> *(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government ;*
>
> *(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)."*

7. In ***Krishna Warrier vs. Velunny (1960 KLT 588),*** the scope and ambit of clause (aa) of the proviso to Section 200 of 1898 Code came up for consideration. In that case, the District Magistrate who was appointed as Commissioner of Enquiry under section 10 of the Commissions of Inquiry Act preferred a complaint, acting or purporting to act in the discharge of his official duties. The question arose, whether his examination under section 200 was necessary or whether clause (aa) of the proviso to section 200 was applicable. It was not disputed that the complainant was a public servant. However, this court held that the complainant had no official duty whatever to prefer a complaint and therefore his examination was necessary. It was held thus:

> *"In my view, S. 10 of the Act also cannot avail the complainant, for the reason, that assuming as Commissioner of Inquiry, he was a public servant, it was not part of his duty to prefer the complaint. I cannot also accept the view taken by the learned Judge below, that by the mere order of Government authorising the complainant to prefer the complaint, he could be deemed to be acting in the discharge of his official duty, because the Government Order did not confer any power on him to be exercised by him as an official, save that of preferring the complaint. On the basis,*

that he had no official duty whatever to prefer a complaint, as the District Magistrate or as the Commissioner of Inquiry, it is difficult to hold, that he purported to act in the discharge of official duty; he could not be deemed to have acted, in either of the two capacities".

8. The decision in **Krishna Warrier vs. Velunny (1960 KLT 588),** was followed by Patna High Court in **Ramashray Singh vs. Anand Mohan (1977 CRL. L.J. 1024).** In that case, the complaint was filed by a Civil Assistant Surgeon against an Advocate. The learned Magistrate took cognizance of the offence. The complainant was not examined. Summons was issued to the accused, which was sought to be quashed in the Criminal Miscellaneous case filed before the High Court. It was held by the Patna High Court thus:

"The proviso to S. 200 of the Code makes it clear that in making the complaint the complainant must be acting or purporting to act in the discharge of his official duties. In other words, the law or his duties should enjoin upon him to make the complaint. S. 195 of the Code lays down the circumstances when a complaint by a public servant has to be filed before cognizance of the particular offence can be taken. When the law does not enjoin a duty on the public servant to make complaint and the public servant makes a

complaint, he does not do so in discharge or in purported discharge of his official duty. I am satisfied that in the instant case the law did not enjoin any duty upon the doctor to make a complaint even though he might have been obstructed in the discharge of his official duty when the occurrence had taken place. Therefore, it was essential for the Subdivisional Magistrate to examine the complainant on solemn affirmation before he proceeded further in the case."

9. In **1976 CRL. L.J. 370 (N.B. Mukherjee vs. State of West Bengal)**, the Calcutta High Court held that in a complaint filed by a Public Prosecutor in Special Court, process against the accused cannot be issued without examining the Public Prosecutor under section 200 of the Code of Criminal Procedure 1898 and that clause (aa) of the proviso to Section 200 would not apply. In **Manidra Nath vs. Public Prosecutor (1979 CRL. L.J. 1465),** the Public Prosecutor filed a petition of complaint against the accused persons for offence under the Arms Act. The question arose, whether the complainant should be examined before issuing process. It was held thus:

"But it must be noticed that it is not sufficient that the complainant should be a public servant to exempt him from examination under section 200 (aa) but he must file a

complaint in the discharge of his duties. It is not part of the duty of the learned Public Prosecutor as learned Public Prosecutor to file a complaint and when he does that his position is that of a private complainant and, therefore, he should have been examined u/s. 200 of the Cr.P.C. "

10. I respectfully follow the decision in **1960 KLT 588** and the decisions of the Calcutta High Court in **N.B. Mukherjee vs. State of West Bengal (1976 CRL. L.J. 370),** and **1979 Crl.L.J.1465** and that of the Patna High Court in **Ramashray Singh vs. Anand Mohan (1977 CRL. L.J. 1024)** referred to above. It is true that the Power of Attorney Holder who filed the complaint on behalf of the complainant-company, is a public servant. He was acting as per the directions issued and he was also authorised to file the complaint by the company. As per the averments in the complaint, the question is whether he was acting in discharge of his official duties in the matter of filing the complaint. It is not sufficient that the person concerned is a public servant and that he was acting in discharge of his official duties. His official duties must also include preferring complaints in accordance with the provisions of law by which he is empowered to file complaints. In the case on hand, the Power of Attorney

Holder of the company has no official duty to file the complaint. In other words, he is not empowered under any law to prefer complaints in discharge of his official duties. Therefore, it cannot be said that clause (a) of the first proviso to Section 200 would apply, thereby exempting him from examination upon oath as provided under section 200 of the Code of Criminal Procedure. I am of the view that the learned Magistrate has committed an error in issuing process to the accused before examining the complainant upon oath and before the substance of such examination is reduced to writing and signed by the complainant .

11. Learned counsel Shri T.G. Rajendran contended that cognizance taken in the case was illegal and therefore all the proceedings are liable to be quashed. He also submitted that if fresh cognizance is to be taken, the complaint would be barred by limitation. I am not inclined to agree with the submission of the counsel. Taking cognizance means that the Magistrate, after applying his mind to the contents of the complaint, decides to proceed further in accordance with the provisions of Chapter XV of the Code of Criminal Procedure. Before recording statement of the complainant cognizance could be taken. A Full Bench of this Court in **Asokan vs. State of Kerala [2005 (3) KLT 770 (F.B.)]** considered the

question whether examination of witnesses under section 200 of the Code of Criminal Procedure is at the pre-cognizance stage or at the post-cognizance stage. The Full Bench held thus :

> *"The argument of the learned Public Prosecutor that the examination of witnesses under Sections 200 and 202 Cr.P.C. is at the pre-cognizance stage stems from a misconception of the law. There is indeed a popular misconception that a Magistrate is supposed to take cognizance only when he actually records the sworn statement of the complainant and his witnesses if any, and issues process to the accused. The correct legal position is that when a Magistrate on receiving a complaint applies his mind and decides to proceed under the various provisions such as Ss. 200 or 202 of Chapter XV Cr.P.C., the Magistrate must be held to have taken cognizance of the offence mentioned in the complaint. If, however, the Magistrate, instead of proceeding under Chapter XV Cr.P.C. , decides to forward the complaint to the police for investigation under S. 156(3) Cr.P.C. or issues a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. (See R.R. Chari v. State of U.P. , AIR 1951 SC 207, Gopal Das Sindhi v. State of Assam & Anr., AIR 1961 SC 986, Jamuna Singh v. Bhadai Shah, AIR 1964 SC 1541 and Laxminarayana v.*

V. Narayana , AIR 1976 SC 1672) . Thus, if a Magistrate, upon receiving a complaint, after applying his mind decides to record the sworn statement of the complainant he can be said to have taken cognizance of the offence. It is not the requirement of law to actually record the sworn statement or proceed to issue summons to the accused to conclude that the Magistrate has taken cognizance of the offence mentioned in the complaint. Hence the examination of the complainant and his witnesses under Section 200 and the subsequent inquiry, if any, under S. 202 Cr.P.C. after postponing the issue of process against the accused are all steps taken in the proceedings at the post-cognizance stage."

12. Section 467 of Code of Criminal Procedure provides that the period of limitation means the period specified in section 468 for taking cognizance of an offence. Section 468 of the Code of Criminal Procedure provides that except as otherwise provided elsewhere in the Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2) of Section 468, after the expiry of the period of limitation as provided therein. In view of the principles mentioned above, the contention that the bar of limitation would apply, is without substance.

13. Moreover, Sec. 142 of the Negotiable Instruments Act

provides that notwithstanding anything contained in the Code of Criminal Procedure 1973, no court shall take cognizance of any offence punishable under section 138 except upon a complaint in writing and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138. Therefore, the period of limitation is to be computed with reference to the date on which the cause of action arises and the complaint is to be filed within the time prescribed. The date of taking cognizance has no relevance in a complaint under Section 138 of the Negotiable Instruments Act.

14. The petitioners seek to quash the complaint on another ground as well. Counsel relied upon the decision in **Sudha Beevi vs. State of Kerala (2004 (2) KLT 746)**. In the said decision it is held that after taking possession of the motor vehicle covered by hire purchase agreement, the complainant could not proceed with a complaint under section 138 of the Negotiable Instruments Act on the basis of the cheques issued by the accused. Counsel for the company submitted that the said decision requires re-consideration. In these cases, I am not deciding these contentions since on the basis of the findings rendered by me, the matter has to go back to the learned Magistrates concerned . All the contentions

of the parties on this question are left open.

15. Shri K.S. Madhusoodanan, counsel appearing for the accused Surendran submitted that the dispute between the accused and the complainant has been settled by compromise entered between the parties during the pendency of O.S.No.5396 of 2004 on the file of the City Civil Court, Chennai. Crl.M.A.No. 5031 of 2007 is filed by the counsel for the accused stating these facts and a copy of the judgment in the suit is produced. Counsel for the complainant has not received instructions as to whether the company intends to proceed further with the complaint in the five cases filed against Surendran. It is hoped, if the company has received the full amount due to it, it would not proceed further with the complainant against Surendran.

16. For the aforesaid reasons, I hold that before issuing process to the accused, learned Magistrate should have examined the complainant upon oath as provided under section 200 of the Code of Criminal Procedure. The proceedings of the learned Magistrate to that extent are set aside. The learned Magistrate shall proceed in accordance with law after complying with the mandatory requirements of the section 200 of the Code of Criminal Procedure. Learned counsel for the complainant

submitted that the complainant may be permitted to file an affidavit in view of the examination under section 145 of the Negotiable Instruments Act . If such a request is made before the learned Magistrate, it shall be dealt with in accordance with law. It is also made clear that I have not pronounced upon the question whether the complaint was filed within the time as provided under the Negotiable Instruments Act.

Criminal Miscellaneous cases are disposed of as above.

K.T. SANKARAN
JUDGE

lk